Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-324

WILLIAM STEINMAN,

Petitioner,

-against-

MAURICE H. NADJARI, as Special Deputy Attorney General, JOHN M. MURTAGH, as Justice of Extraordinary Special and Trial Term of Supreme Court, LOUIS J. LEFKOWITZ, as Attorney General of State of New York, and MALCOLM WILSON, as Governor of State of New York,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

This Reply Brief is respectfully submitted in response to the Brief for Respondent Nadjari in opposition to the Petition for Certiorari.

The Respondent makes the following glaring misstatements to this Honorable Court:

1. That in *Matter of Moritt v. Extraordinary Special and Trial Term of Supreme Ct.*, ——US——, 96 S.Ct. 557, "this Court dismissed the petition 'on the merits' " (Resp. Br. p. 6). This statement is incorrect. The Court dismissed the *Moritt petition* "solely for lack of jurisdiction."

2. That the cases of *United States ex rel. Monty v. McQuillan*, 385 F. Supp. 1308 (EDNY 1974), affd. by the Second Circuit May 1, 1975; *People v. Davis*, 67 Misc. 2d 14; *Matter of Reynolds v. Cropsey*, 241 NY 389 (1925) and *Saranac Land and Timber Co. v. Supreme Court*, 220 NY 487 have all previously resolved the constitutional issues herein adversely to the Petitioner's contentions. (Resp. Br. pp. 6-8)

We respectfully submit in reply, however, that each of these cases construed the statute in its *pre-amended* form. None of these cases dealt with fundamental question of separation of powers presented by the amendment thereto as follows: "*The Governor may terminate the assignment of the Justice and may name another Justice in his place to hold the same term.*"

3. That "Petitioner's next challenge is to section 149 subdivision 2 of the Judiciary Law, which provides that the Appellate Division, in its discretion, may hear a motion addressed to an extraordinary term." (Resp. Br. p. 10)

In answer, we respectfully submit that the Petitioner has not in any way asserted the latter issue in the Petition for Certiorari before this Court.

4. That "the additional power of the Governor to terminate the assignment and name another justice to hold the term is one of necessity, occasioned by the possibility that a presently assigned justice may become unable or unwilling to continue his position." (Resp. Br. p. 8).

In reply, we respectfully submit that the absolute power vested in the Governor to terminate the assignment of the Justice and replace him with another, is not duplicated in any other statute pertaining to judicial office. The autocratic power to place and replace the judge at will is not at all grounded upon reasons of necessity pertaining to illness or incapacity, in view of the fact that New York's Judiciary Law, applicable to all other judges, amply covers

such contingencies through the powers of administrative judicial supervision. (*Judiciary Law, Article 7-A*).

In *haec verba*, the statute here in issue imposes no limits or restraints whatever, and unconstitutionally delegates to the Governor complete control over his appointee as presiding justice of the Extraordinary Special and Trial Term of the Supreme Court.

The evil potentials of such a statute might be well viewed in the context of the historical Watergate prosecutions, where the President summarily fired the Attorney General from his quasi-judicial office in order to deter further inquiry. *Ipso facto*, if the Congress had created a statute identical as at bar, giving the President the absolute power to remove Federal Judge Sirica as presiding judge "and name another justice in his place to hold the same term", is it not conceivable that at the very least, the mere *potential* of removal might not have had a stultifying effect upon the independence of the judiciary? And in view of the actual "Saturday Night Massacre" of the quasi-judicial Attorney General which did occur, is it not conceivable too that the President might not have followed suit under such a statute to remove and replace Judge Sirica with another Judge more attuned to the aims of the Executive? In sum, it is in the *potential* of the statute in issue, not in what actually occurs under it, that renders it offensive to the doctrine of separation of powers under the Fifth and Fourteenth Amendments of the Constitution of the United States.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Dated: October 14, 1976

Respectfully submitted,

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